

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PIERRE LAMAR MCCALL,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 252753

Macomb Circuit Court

LC No. 03-000897-FC

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, three counts of kidnapping, MCL 750.349, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to prison terms of mandatory life for the murder conviction, thirty to fifty years for the kidnapping convictions, and two years for each of the felony-firearm convictions. He appeals as of right. We affirm.

This case arises from the shooting death of defendant's estranged girlfriend and mother of his child, Tiffany Burnett, on October 4, 2002. The prosecutor's theory was that defendant became enraged upon discovering that Burnett had become romantically involved with another woman. Defendant pistol-whipped Burnett for several minutes outside her home in Clinton Township and shot her several times before barricading himself in another home and taking several hostages. He eventually surrendered to police. Defendant's theory was that he was guilty only of voluntary manslaughter because he was acting in the heat of passion, and because the shooting was accidental in that the shots occurred when his gun accidentally discharged on three different occasions.

Before trial, the prosecutor filed a notice of intent to introduce prior bad acts evidence under MRE 404(b). The prosecutor also filed a motion to strike the testimony of defendant's expert witness, Dr. Lyle Danuloff, a clinical psychologist who evaluated defendant "regarding the possibility that the charge against him could be changed to Voluntary Manslaughter." The prosecutor moved to strike Dr. Danuloff's testimony on the ground that defendant's hearsay and self-serving statements to Dr. Danuloff would be admitted into evidence without defendant

taking the stand. The trial court apparently denied both motions,¹ ruling that the prosecutor could not introduce evidence of prior bad acts in his case-in-chief, but could introduce evidence of prior bad acts in rebuttal or on cross-examination.² Indeed, the record contains a “hearing disposition” which states in part that the “Parties stipulate that if the defendant testifies, then Dr. Danuloff can testify. People can cross-examine both as to prior incidents.”³

Defendant testified in his own behalf and described his relationship with the victim as free of domestic abuse except for a “slap” that occurred on September 30, 2002. Dr. Danuloff testified that defendant stated in an interview with Dr. Danuloff that he and the victim had a non-violent relationship, that there was no domestic abuse between defendant and the victim, and that police had never been called as a result of any abuse. On rebuttal, Clinton Township Police Officer Dena Caringi testified that she was called to a disturbance at the victim’s house approximately one month before the victim was killed. Caringi testified that the victim said defendant beat her as she lay on the floor of her home, would not stop beating her to allow her to get up, and threatened to kill her. The prosecution also introduced photographs showing evidence of the victim’s injuries from the altercation. Defendant now argues that the admission of the rebuttal testimony and photographs was an attempt to introduce defendant’s prior bad acts in violation of the rules of evidence. The decision whether to admit other-acts evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

By stipulating to introduction of the other acts evidence on cross-examination by the prosecutor, defendant waived any evidentiary argument regarding admissibility of the prior bad acts evidence. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Even if the argument was not waived, it is without merit. Rebuttal evidence is admissible to “contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.” *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Caringi’s rebuttal testimony was proper in scope and purpose because it directly weakened and impeached the testimony of defendant’s expert that defendant and the victim had a non-violent relationship. Caringi’s testimony regarding her prior contact with the victim and defendant was relevant and not unfairly prejudicial, and was properly admitted.

With regard to the admission of the photographs on rebuttal, we note that defense counsel objected at trial on the ground that the defense had not been given sufficient notice of the photographs and that the prosecutor had not previously produced them during discovery. Thus, defendant did not preserve any issues regarding admissibility of the photographs under MRE 404(b), *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (an objection on one ground does not preserve an appellate attack on a different ground), and we find no plain error

¹ Transcripts of the hearing or hearings are not included in the lower court record.

² Indeed, defense counsel did not object to the cross-examination or to the rebuttal testimony.

³ The “prior incidents” referred to include a September 2, 2002, incident and a September 30, 2002, incident, both of which resulted in the police being summoned to the scene.

affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763- 765; 597 NW2d 130 (1999).

Defendant also argues that the prosecutor impermissibly drew inferences from defendant's behavior, telling the jury in his closing argument that defendant's purported caring for his son was a recent fabrication, that defendant did not want the victim to leave him because doing so would stop the "gravy train;" and that the victim had "outgrown" defendant.

An unpreserved constitutional error may be considered on appeal if: (1) an error occurred, (2) it was plain, and (3) it affected the defendant's substantial rights. To establish that the error affected substantial rights, a defendant must usually show that the error affected the outcome of the lower court proceedings. Reversal is warranted if the plain error resulted in the conviction of an actually innocent defendant or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000); *Carines, supra* at 763.

The prosecutor permissibly drew inferences based upon direct evidence of defendant's actions toward the victim and their son. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). Nothing in the record indicates that the prosecutor argued facts not in evidence or that defendant was unfairly prejudiced by the prosecutor's closing argument.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette